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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FISHER INVESTMENTS, INC.,

Plaintiff, Cross-defendant and Appellant,

v.

THOMAS J. CASPER,

Defendant, Cross-complainant and Respondent;

KENNETH FISHER,

Cross-defendant and Appellant.

G039965

(Super. Ct. No. 06CC11472)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed in part and reversed in part.

Duckor Spradling Metzger & Wynne, and Scott L. Metzger and Robert M. Shaughnessy, for Plaintiff, Cross-defendants, and Appellants.

Robert A. Peterson, for Defendant, Cross-complainant, and Respondent.

Fisher Investments, Inc., and Kenneth Fisher (collectively and singular Fisher Investments, unless the context indicates otherwise) appeal from orders denying their motion to compel arbitration and their special motion to strike a complaint filed by Thomas Casper.[1] Fisher Investments argues the trial court erroneously denied the motion to compel arbitration because it did not waive its right to arbitrate. It also contends the court erroneously denied its special motion to strike because the challenged causes of action arise from protected activity, Casper did not demonstrate a probability of prevailing on those causes of action, and the challenged statements are protected by the litigation privilege. As we explain below, we conclude the court properly denied Fisher Investments' motion to compel arbitration, and the court properly denied the special motion to strike one of the causes of action, but erroneously denied the motion as to other causes of action.

We affirm the trial court's order denying Fisher Investments' motion to compel arbitration. We affirm that part of the court's order denying Fisher Investments' special motion to strike Casper's second cause of action, and reverse that part of the court's order denying the special motion to strike the first, seventh, eighth, and ninth causes of action.

FACTS

Fisher Investments is an investment adviser registered under federal law. Fisher is the chairman and chief executive of Fisher Investments.

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[1] Code of Civil Procedure section 425.16 authorizes a special motion to strike a Strategic Lawsuit Against Public Participation (SLAPP) action, and is referred to as the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

In February 2001, by way of a written employment contract (the Employment Contract), Fisher Investments hired Casper as a sales person with the title of Vice President of the Private Client Group. The Employment Contract prohibited Casper from disclosing, using, or retaining any proprietary or confidential information after termination of employment. The Employment Contract also prohibited Casper from disclosing or using any customer information to solicit those customers after termination of employment.

In June 2001, Fisher Investments and Casper executed a "Mutual Agreement to Arbitrate Claims" (the Arbitration Agreement). The Arbitration Agreement provided that all claims Fisher Investments may have against Casper, and all claims Casper may have against Fisher Investments and its officers and directors, must be arbitrated except those claims expressly excluded. It stated the party not initiating the claim must choose to arbitrate any claim with either the American Arbitration Association (AAA) or Judicial Arbitration & Mediation Services (JAMS). The Arbitration Agreement also required Fisher Investments to pay any filing fee and the arbitrator's fees and costs. Finally, it provided for limited discovery.

On October 6, 2006, Casper quit his job at Fisher Investments. That same day, Casper secured employment with Smith Barney.

The following week, Fisher Investments commenced arbitration against Casper with JAMS. However, pursuant to the Arbitration Agreement, Casper had the right to choose the arbitration forum, and he chose AAA.

On October 17, 2006, Fisher Investments sent letters to Wachovia Securities Financial Network (Wachovia) and Morgan Stanley threatening legal action against any firm that hires a former Fisher Investments employee based on an express or implied understanding that the employee would bring a portable book of Fisher Investments' customers.

On October 20, 2006, Fisher Investments filed a "Form U5 Uniform Termination Notice for Securities Industry Registration" (Form U5) for Casper with the Central Registration Depository (CRD) maintained by the National Association of Securities Dealers, Inc., now the Financial Industry Regulatory Authority. The Form U5 indicated Fisher Investments commenced an internal review of Casper "for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules[,] or industry standards of conduct[.]" The Form U5 explained: "Since . . . Casper's separation from Fisher Investments, the firm has receive evidence that . . . Casper, both during and after his employment with the firm, expropriated the firm's trade secrets for his own commercial purposes. The firm has initiated legal action against . . . Casper in this regard." The Form U5 instructions concerning internal reviews stated: "Generally, the [i]nternal [r]eview [d]isclosure question in [q]uestion 7B and the [i]nternal [r]eview [r]eporting [p]age . . . are used to report matters relating to compliance, not matters of a competitive nature. Responses should not include situations relating to disputes between the firm and the individual over ownership or possession of information or records pertaining to business conducted by the individual."

The same day, Wachovia hired Casper. Four days later, on October 24, 2006, Casper resigned from Smith Barney.

A few days later, Fisher Investments filed a lawsuit against Wachovia alleging the following causes of action: (1) misappropriation of trade secrets and confidential information; (2) intentional interference with prospective business relations; and (3) violation of Business and Professions Code section 17200. The following month, Fisher Investments filed a "Statement of Claim" against Casper with AAA.

The next month, Fisher Investments' counsel informed Casper's counsel that AAA considered its claims a commercial matter rather than an employment matter and, therefore, the filing fee would be tripled. In an e-mail to Casper's counsel, Fisher Investments' counsel stated: "I suggest we try a joint call to the case administrator, or, in

the alternative, go to [JAMS], or simply join Casper with Wachovia in the superior court action. Please let me know your thoughts." The following month, Casper's counsel informed Fisher Investments' counsel "Casper had agreed to litigate rather than arbitrate." Fisher Investments' counsel confirmed in writing that Fisher Investments' counsel and Casper's counsel had "agreed that it makes sense to name . . . Casper as a defendant in [the Wachovia] action *in lieu of* pursuing Fisher's claims against him in a separate arbitration." (Italics added.)

In March 2007, Fisher Investments filed a first amended complaint against Wachovia and Casper alleging the following causes of action: (1) misappropriation of trade secrets and confidential information; (2) intentional interference with prospective business relations; and (3) violation of Business and Professions Code section 17200; and (4) breach of employment contract against Casper only. Casper answered. Over the course of the next eight months, Casper sought extensive discovery from Fisher Investments—17 separate sets of interrogatories to Fisher Investments; three sets of interrogatories to Fisher; two requests for production to Fisher Investments; and two requests for admissions to Fisher Investments.

In April 2007, Fisher Investments sent a letter to at least one of its customers[2] informing him Casper was a former employee who may attempt to contact him and try to sell him his new business interests. The letter framed the issue as this: "[W]ould you trust your family's financial future in any regard to someone who could be proven to not live up to his word?" The letter also stated Fisher Investments was pursuing legal action against Casper for violating his employment agreement, and asked how a person could be trusted if the person did not "live up to his written word[.]"

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[2] In his third amended cross-complaint, Casper claims Fisher Investments sent this, or a similar letter, to 350 people whom Casper had worked with while at Fisher Investments.

On April 25, 2007, Casper filed a cross-complaint against Fisher Investments, and Fisher individually, alleging six causes of action.

In November 2007, Fisher Investments and Wachovia executed a memorandum of understanding concerning Fisher Investments' complaints, and Wachovia was later dismissed with prejudice from the lawsuit. In December 2007, Fisher Investments filed a motion to compel arbitration and request for stay in judicial proceedings.

Casper filed a third amended cross-complaint alleging the following causes of action:[3] (1) interference with contract; (2) libel; (3) libel; (4) fraud against Fisher Investments; (5) rescission against Fisher Investments; (6) breach of contract against Fisher Investments; (7) common law unfair competition; (8) violation of Business and Professions Code section 17200; and (9) violation of Labor Code section 1050.

In December 2007, Casper opposed the motion to compel arbitration. Fisher Investments replied. The trial court denied the motion based on the grounds Fisher Investments waived its right to arbitrate the dispute.

That same month, Fisher Investments filed a special motion to strike Casper's third amended cross-complaint. Casper opposed the motion, supported by his declaration, and Fisher Investments replied, supported by its counsel's declaration. The trial court denied the motion.

DISCUSSION

I. Motion to Compel Arbitration

Fisher Investments argues (1) the trial court erroneously denied its motion to compel arbitration because it did not waive its right to arbitrate when it filed its first amended complaint joining Casper in the Wachovia litigation, and (2) because Fisher was

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[3] Casper alleged the causes of action against Fisher Investments and Fisher, unless noted otherwise.

not a party to the lawsuit until Casper joined him in the cross-complaint, Fisher could not have waived his right to arbitrate. Neither of these contentions have merit.

"The right to compel arbitration arises from the parties' contract and, as with other contractual rights, is subject to waiver. Such waiver may be express or implied from the parties' conduct." (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2007) ¶ 5:167, p. 5-130.) Although the term "'waiver'" has multiple meanings, it generally means the "voluntary relinquishment of a known right." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 314.)

Here, the month after Fisher Investments filed its complaint against Wachovia, it filed its arbitration claim against Casper with AAA. Soon thereafter, Fisher Investments' counsel informed Casper's counsel that AAA considered its claims a commercial matter and, therefore, the filing fee would be tripled. In an e-mail to Casper's counsel, Fisher Investments' counsel suggested filing the claim with JAMS or joining Casper in the Wachovia litigation. After Casper's counsel informed Fisher Investments' counsel "Casper had agreed to litigate rather than arbitrate[,]" Fisher Investments' counsel confirmed in writing that Fisher Investments' counsel and Casper's counsel had "agreed that it makes sense to name . . . Casper as a defendant in [the Wachovia] action *in lieu of* pursuing Fisher's claims against him in a separate arbitration." (Italics added.) In March 2007, Fisher Investments filed a first amended complaint against Wachovia and Casper.

Fisher Investments' decision to join Casper in the Wachovia litigation "in lieu of" proceeding with its arbitration claim against Casper was an express waiver of its right to arbitrate with him. Fisher Investments exercised its right to arbitrate with Casper when it filed its claim with AAA, and was in the midst of arbitration when it chose to voluntarily relinquish its right to arbitrate with him. Whether it was for the sake of judicial economy or to avoid paying the higher commercial filing fee, Fisher Investments abandoned its right. Fisher Investments cannot withdraw its express waiver and return to

arbitration when it is now convenient, after having already exercised and relinquished that known contractual right.

Fisher Investments relies on *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*), *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 Cal.App.4th 1522, 1537-1538 (*Aviation Data*), and *Britton v. Co-op Banking Group* (9th Cir. 1990) 916 F.2d 1405, 1413 (*Britton*), to argue it did not waive its right to arbitration when it joined Casper in the Wachovia litigation because Casper was not prejudiced. These cases are inapposite as none involved an express waiver of a contractual right to arbitrate.

In *St. Agnes, supra,* 31 Cal.4th at page 1205, the issue was whether defendant waived its contractual arbitration rights by seeking to void the contract that included the arbitration provision, initiating a lawsuit, and force litigation in its preferred venue. In *Aviation Data, supra,* 152 Cal.App.4th at pages 1539-1541, the court addressed the issue of whether defendant waived its contractual arbitration rights when it engaged in intense litigation, and attempted to obtain a settlement through misleading and deceptive tactics. In *Britton, supra,* 916 F.2d at page 1413, the issue was whether a party waived its contractual arbitration rights by seeking to avoid discovery and stay district court proceedings before moving to compel arbitration. None of these cases involved the situation we have here—a party's voluntary relinquishment of the known right to arbitrate.

Fisher Investments also claims the trial court erroneously denied its motion to compel arbitration as to Fisher because he was not a party to the lawsuit until after it filed its first amended complaint naming Casper in the Wachovia litigation. Casper relies on section 1281.2, subdivision (c), to contend the trial court properly denied Fisher Investments' motion to compel arbitration as to Fisher because there was a risk an arbitrator's rulings might conflict with the trial court's rulings on common issues of fact

or law. Fisher Investments counters Casper waived this argument because he did not raise it at trial.[4]

At the hearing on Fisher Investments' motion to compel arbitration, after considerable argument from both counsel, the trial court denied the motion as to Fisher Investments. The court stated: "I will take . . . Fisher under submission even though I can't cite to it. There's a point I want to look at, and I will take into account . . . Fisher was brought in April, two months after Fisher Investments." In its minute order, the trial court stated the tentative ruling posted on the Internet on January 4, 2007, became its final ruling. The record before us does not include a copy of the tentative ruling. The court denied the motion to compel arbitration as to Fisher Investments and Fisher.

Fisher Investments argues that even if the motion to compel arbitration was properly denied as to Fisher Investments, it was erroneously denied as to Fisher because he was not joined in the judicial proceeding until after Fisher Investments decided to return to court and Casper named him in the cross-complaint. We disagree. Fisher's right to compel arbitration of all claims arising out of Casper's employment derived from the Arbitration Agreement as an officer/director of Fisher Investments. Casper's claims against Fisher arose from the Employment Contract, and when Fisher Investments waived its right to arbitrate, it also waived that right on behalf of its officers and directors, including Jeffrey Fisher, even though he did not sign the Arbitration Agreement. Therefore, any right Fisher had individually to arbitrate claims with Casper arising from the Employment Contract was waived when Fisher Investments returned to court.

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[4] In the appellant's appendix there is a supplemental declaration dated February 8, 2008, from Casper's counsel opposing the motion the compel arbitration citing to section 1281.2, subdivision (c). The trial court's minute order denying the motion to compel arbitration is dated January 28, 2008.

II. Special Motion to Strike

Fisher Investments filed a special motion to strike five of the nine causes of action in Casper's third amended cross-complaint. As we explain below, we conclude the trial court properly denied Fisher Investments' special motion to strike Casper's second cause of action, but erroneously denied it as to his first, seventh, eighth, and ninth causes of action.

A. General Principles

Section 425.16, subdivision (b)(1), states, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Section 425.16 is to be "construed broadly."

Consideration of a section 425.16 special motion to strike anticipates a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We review a trial court's ruling on a special motion to strike de novo. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675.)

B. Protected Activity

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] [T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Section 425.16, subdivision (e), states: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

In *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 728 (*Fontani*), disapproved on other grounds in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 203, footnote 5, the court addressed the identical issue we have here—whether the filing of the Form U5 was in furtherance of defendant's right of petition or free speech. After defendant terminated plaintiff, defendant filed a Form U5 stating it terminated plaintiff "for 'violation of company policies by

misrepresenting information in the sale of annuities, not being properly registered and firm procedures regarding annuity applications.'" (*Fontani, supra,* 129 Cal.App.4th at p. 726, fn. omitted.) The court explained the filing of the Form U5 was an act in furtherance of defendant's constitutional rights of petition or free speech under section 425.16, subdivision (e)(1) and (4). (*Id.* at pp. 727-728.) With respect to section 425.16, subdivision (e)(1), the court reasoned the NASD was an official body, and the filing of the Form U5 constituted a communication before an official proceeding, even when there was no evidence the NASD was investigating plaintiff because the section included "communications designed to prompt official action[]" and the NASD was "the primary regulatory body of the broker-dealer industry." (*Id.* at pp. 729, 731.) As to section 425.16, subdivision (e)(4), the court explained defendant's filing of the Form U5 was a matter of public interest because the Form U5 concerned "possible conduct capable of affecting a significant number of investors." (*Id.* at pp. 732-733.)

Here, after Casper resigned, Fisher Investments filed a Form U5 with the CRD, an act Casper concedes was required. (Cal. Code Regs., tit. 10, § 260.236.1.) In fact, in opposing the special motion to strike, Casper did not contest the issue of whether Fisher Investments' filing of the Form U5 was an act in furtherance of its constitutional right of petition or free speech. Now on appeal, Casper invites us to ignore or read narrowly the *Fontani* court's holding. We decline that invitation. Based on the *Fontani* court's well-reasoned opinion, Fisher Investments' filing of the Form U5 was an act in furtherance of its constitutional rights of petition or free speech in connection with a public issue.

Finally, Casper claims Fisher Investments filing of the Form U5 was not an act in furtherance of its constitutional rights of petition or free speech in connection with a public issue because Fisher Investments did not follow the Form U5 instructions, the information on the Form U5 did not relate to a complaint with the NASD, and it was not

seeking action with the NASD. The *Fontani* court addressed Casper's latter two claims, and we need not discuss them further. (*Fontani, supra,* 129 Cal.App.4th at pp. 731-733.)

With respect to its claim Fisher Investments did not follow the Form U5 instructions because it included "unwarranted information about a private dispute and deliberately mischaracterize[d] the dispute[,]" the validity of the speech is not a proper inquiry when determining whether the anti-SLAPP statute potentially applies. (*Navellier, supra,* 29 Cal.4th at p. 94 [court refused to read "separate proof-of-validity requirement into . . . statute"].) "[A]ny 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' [Citation.] [Casper's] argument 'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.' [Citation.]" (*Id.* at p. 94.) We must now determine whether Casper demonstrated a probability of prevailing on any of the five causes of action.

C. Probability of Prevailing

"[T]o avoid dismissal of each claim under section 425.16, plaintiff bore the burden of demonstrating a probability that [he] would prevail on the particular claim. . . . 'In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must "'state[ ] and substantiate[ ] a legally sufficient claim.'" [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's

evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]' [Citation.] [Citations.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) A plaintiff "need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. [Citations.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

Here, Fisher Investments moved to strike the following causes of action from Casper's third amended cross-complaint: *first*-Interference with contract and injunctive relief; *second*-Libel; *seventh*-Common law unfair competition; *eighth*-Violation of Business and Professions Code section 17200; and *ninth*-violation of Labor Code section 1050. In its special motion to strike, Fisher Investments argued filing the Form U5 was an act in furtherance of its constitutional rights of petition or free speech in connection with a public issue, and its statements contained in the Form U5 were privileged subject to Civil Code section 47, subdivision (b)'s litigation privilege. In his opposition to the special motion to strike, Casper spent the majority of his time explaining why the litigation privilege was inapplicable. He does say Fisher Investments violated Labor Code section 1050 if its intent was to prevent him from gaining employment. And, he states California public policy favors fair competition. But he does not address the required elements of many of the causes of action Fisher Investments moved to strike. And he provides very little admissible evidence demonstrating the challenged causes of action were both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment. Casper states he never, while working for Fisher Investments or after leaving its employ, expropriated Fisher Investments' trade secrets. Additionally, in his respondent's brief, he argues "Fisher [Investments] has not established that Casper will not prevail in the action[.]" This is not the proper standard for a plaintiff opposing a special motion to strike. Despite Casper's dismal efforts at satisfying his low statutory burden of proof, we will look to his pleadings and evidentiary submission to determine whether he satisfied his burden of

demonstrating a probability of prevailing on each of his causes of action. We conclude he succeeded as to one of his causes of action, but failed as to the others.

In his third amended cross-complaint, Casper stated Smith Barney hired him pursuant to a written contract on October 6, 2006. He alleged Fisher Investments had a business relationship with Smith Barney. Casper stated that to prevent him from obtaining business from Fisher Investments' customers, Fisher Investments intentionally disrupted his contract with Smith Barney by threatening to pull its business from Smith Barney, threatening to sue Smith Barney, and initiating arbitration against him. Casper said Smith Barney eventually suggested he should find employment elsewhere, which he did.[5]

Casper also alleged Fisher Investments threatened to sue Morgan Stanley and Wachovia if either hired Casper with the express or implied understanding he would bring with him Fisher Investments' customers.

Casper stated Fisher Investments filed the Form U5 with the NASD on October 20, 2006. He alleged Fisher Investments falsely stated he was under internal review for fraud, wrongful taking of property, or violating investment-related statutes, and falsely stated he expropriated trade secrets. His stated that as a result of the filing, his reputation has been damaged, and he had to take a licensing examination.

Finally, Casper alleged Fisher sent letters to approximately 350 people whom Casper had dealt with while he was employed at Fisher Investments accusing him of among other things breaching the post-employment provisions of his employment contract and being dishonest. With this factual background in mind, we will address each of the challenged causes of action.

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[5] It is unclear though when Casper left Smith Barney. He stated Wachovia hired him on October 20, 2006, but in his declaration supporting his opposition to Fisher Investments' special motion to strike, Casper stated he resigned from Smith Barney on October 24, 2006, four days after Wachovia hired him.

1. First cause of action-Interference with contract and injunctive relief

"The elements of intentional interference [with contract] are: '(1) a valid contract between plaintiff and a third party; (2) defendant[']s[] knowledge of the contract; (3) defendant[']s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' [Citation.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1047.)

In his first cause of action, after incorporating the factual allegations, Casper alleged: "The aforesaid actions of Fisher Investments and . . . Fisher constitute interference with contract. [¶] As a result of said wrongful conduct Casper has been damaged in an amount to be established by proof at trial. [¶] The aforesaid actions by . . . Fisher[] [and] Fisher Investments . . . were oppressive, malicious[,] and fraudulent; and were done with the intent to cause injury and harm to Casper; and were despicable and undertaken with a willful and conscious disregard of [Casper's] rights. Casper is entitled to recover punitive and/or exemplary damages from said defendants. [¶] There is no adequate remedy at law to remedy the false statements on the Form U5 filed by Fisher Investments and, therefore, Casper seeks an order that Fisher Investments amend the Form U5 to delete the answer to [q]uestion 7B and any other information related to said answer."

Although Casper incorporated all the factual allegations into his first cause of action, the third amended cross-complaint in the appellant's appendix does not appear to be verified.[6] "It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the

[6] The third amended cross-complaint in the appellant's appendix does not include a file stamp indicating Casper filed it with the superior court. The register of actions states Casper filed a third amended cross-complaint on December 4, 2007. Fisher Investments does not dispute this is the operative pleading.

complaint. Substantiation requires something more than that." (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568 (*DuPont*).) And, his declaration is void of any evidence supporting a cause of action for interference of contract and injunctive relief. Therefore, Casper did not demonstrate a probability of prevailing on his first cause of action.

2. Second cause of action-Libel

"A private plaintiff in a libel case must prove that the defendant published a false statement about the plaintiff to a third party and that the false statement caused injury to the plaintiff." (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1173-1174.)

In his second cause of action, after incorporating the factual allegations, Casper stated he enjoyed a good reputation personally and professionally, and "[t]he answer to [q]uestion 7B on the Form U5 is libelous on its face." He explained the statement was untrue and exposed him to hatred because it accused him of fraud, wrongful taking of property, or violating investment-related statutes. He also claimed the statement implied he was dishonest and corrupt in his business dealings. He asserted Fisher Investments published the statement with malice because it knew the information was not the proper subject for reporting on a Form U5. He stated Fisher Investments' intent was to damage his reputation, make it more difficult for him to find a job, and cause him to have to sit for a licensing examination. In his declaration supporting his opposition to Fisher Investments' special motion to strike, Casper declared the following: "While working at Fisher Investments I never expropriated any trade secrets of the company. [¶] After leaving the employment of Fisher Investments, I never expropriated any trade secrets of the company." Casper's statements in his declaration demonstrated his second cause of action was legally sufficient and was supported by a prima facie showing of facts. Thus, Casper demonstrated a probability of prevailing on his second cause of action.

3. Seventh cause of action-Common law unfair competition

"The common law tort of unfair competition is generally thought to be synonymous with the act of 'passing off' one's goods as those of another. The tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection. [Citation.] According to some authorities, the tort also includes acts analogous to 'passing off,' such as the sale of confusingly similar products, by which a person exploits a competitor's reputation in the market. [Citation.] [¶] . . . [¶] . . . The common law tort of unfair competition . . . required a showing of competitive injury . . . . [Citations.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-1264.)

In his seventh cause of action for common law unfair competition, again after incorporating the factual allegations, Casper stated: "The foregoing action by . . . Fisher and Fisher Investments constitutes common law unfair competition. [¶] The aforesaid actions by . . . Fisher and Fisher Investments were oppressive, malicious[,] and fraudulent; and were done with the intent to cause injury and harm to Casper; and were despicable and undertaken with a willful and conscious disregard for [Casper's] rights. Casper is entitled to recover punitive and/or exemplary damages from said defendants." Although Casper again incorporated all the factual allegations into his seventh cause of action, as we explain above, his third amended complaint is not verified, and his declaration is void of any evidence supporting a cause of action for common law unfair competition. (*DuPont, supra*, 78 Cal.App.4th at p. 568.) Therefore, Casper did not demonstrate a probability of prevailing on his seventh cause of action.

4. Eighth cause of action-Violation of Business and Professions Code section 17200

Business and Professions Code section 17200 proscribes "any unlawful, unfair or fraudulent business act or practice[.]" These varieties of unfair competition are disjunctive, i.e., any act that is "'unlawful, unfair[,] or fraudulent'" can serve as the basis for a claim of unfair competition. (*Cel-Tech Communications, Inc. v. Los Angeles*

Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, italics omitted.) With respect to the unlawful variety, "'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Ibid.*)

In his eighth cause of action, again after incorporating the factual allegations, Casper stated, "The foregoing actions by . . . Fisher and Fisher Investments violates Business [and] Professions Code section 17200." Casper again failed to satisfy his statutory burden and establish his eighth cause of action had minimal merit. His third amended complaint is not verified, and his declaration is void of any evidence supporting a cause of action for a violation of Business and Professions Code section 17200. (*DuPont, supra,* 78 Cal.App.4th at p. 568.) Thus, Casper did not demonstrate a probability of prevailing on his eighth cause of action.

5. Ninth cause of action-Violation of Labor Code section 1050

Labor Code section 1050 states: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor." Labor Code section 1054 authorizes treble damages in a civil action for a violation of Labor Code section 1050.

In his ninth cause of action, again after incorporating the factual allegations, Casper stated, "The misrepresentations of Fisher Investments and . . . Fisher set forth above violate Labor Code section 1050 et seq." As with his first, seventh, and eighth causes of action, Casper failed to establish his ninth cause of action has minimal merit. His third amended complaint is not verified, and his declaration is void of any evidence supporting a cause of action for violating Labor Code section 1050. (*DuPont, supra,* 78 Cal.App.4th at p. 568.) Therefore, Casper did not demonstrate a probability of prevailing on his ninth cause of action.

That does not end our inquiry though. Because we have concluded Casper made a prima facie showing of facts to sustain a favorable judgment on his second cause of action, we must now determine whether the statements underlying that cause of action—the statements in the Form U5—were privileged pursuant to Civil Code section 47, subdivision (b). We conclude they were not.

D. Civil Code section 47, subdivision (b)-Litigation privilege

Fisher Investments' claim its statements in the Form U5 were privileged subject to Civil Code section 47, subdivision (b). Not so.

Civil Code section 47, subdivision (b), states, "A privileged publication . . . is one made: [¶] . . . [¶] (3) [I]n any other official proceeding authorized by law . . . ." "This privilege is absolute[.]" (*Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 145.) "'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.] . . . 'The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. [A] statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action.' [Citation.]" (*Id.* at pp. 146-147.) Where the facts are undisputed, as they are here, the question of privilege is de novo. (*Id.* at p. 147.)

Fisher Investments cites to its counsel's letter responding to Casper's counsel's written complaint concerning the explanation for its internal review in the Form U5 to support its assertion its claims against Casper were compliance related. It repeatedly claims that because Casper attached the letter as an exhibit to its third amended cross-complaint, the facts in the letter are established as true. Although Fisher Investments offered to refile the Form U5 with a new explanation, Fisher Investments

points to no evidence in the record, and we found none, that indicates it did so. We limit our discussion to the Form U5 that Fisher Investments filed, and whether those statements were privileged pursuant to Civil Code section 47, subdivision (b).

Relying on *Fontani*, *supra*, 129 Cal.App.4th 719, Fisher Investments claimed its filing of the Form U5 was privileged pursuant to Civil Code section 47, subdivision (b). We disagree.

On the Form U5, Fisher Investments indicated Casper was or is "under internal review for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules[,] or industry standards of conduct[.]" The Form U5 explained: "Since . . . Casper's separation from Fisher Investments, the firm has received evidence that . . . Casper, both during and after his employment with the firm, *expropriated the firm's trade secrets for his own commercial purposes*. The firm has initiated legal action against . . . Casper in this regard." (Italics added.) The Form U5 instructions explained internal reviews "are used to report matters relating to compliance, not matters of a competitive nature. Responses should not include situations relating to disputes between the firm and the individual over *ownership or possession of information or records* pertaining to business conducted by the individual." (Italics added.)

"Under the UTSA, a prima facie claim for misappropriation of trade secrets 'requires the plaintiff to demonstrate: (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff.' [Citation.]" (*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 297.) Civil Code section 3426.1, subdivision (d), defines "'trade secret'" as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can

obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Fisher Investments first amended complaint included a cause of action against Casper and Wachovia for misappropriation of trade secrets. The cause of action described the trade secrets and confidential and proprietary information as customer identities and their contact information, customer preferences and investments strategies, and the financial accommodations granted each customer. Although Fisher Investments characterizes its internal review as compliance related, based on its explanation in the Form U5 and its complaint, it is essentially a dispute over the ownership and possession of information—its customer list. As the Form U5 instructions state, internal reviews are used to report compliance related matters, not competitive matters. Because Fisher Investments' explanation for its internal review was not the proper subject of reporting on the Form U5, the statement was not reasonably relevant to the subject matter of the action. Therefore, the filing of the Form U5 was not privileged pursuant to Civil Code section 47, subdivision (b).

And Fisher Investments reliance on the *Fontani* court's conclusion the filing of the Form U5 was privileged pursuant to Civil Code section 47, subdivision (b), is not persuasive. The *Fontani* case did not involve the issue we have here—whether communication was reasonably relevant to the action.

Finally, Fisher Investments relies on its counsel's letter to Casper's counsel to argue that because Casper allegedly violated 17 Code of Federal Regulations part 248—Regulation S-P: Privacy of Consumer Financial Regulation, and the California Financial Information Privacy Act (Fin. Code, § 4050 et seq.), Casper violated investment-related statutes and its internal review of Casper was compliance related. As we explain above, we limit our analysis to the Form U5 Fisher Investments filed, not its after the fact explanation as to what it meant when it filed the form.

DISPOSITION

The trial court's order denying Fisher Investments' motion to compel arbitration is affirmed. That part of the court's order denying Fisher Investments' special motion to strike Casper's second cause of action is affirmed, and that part of the court's order denying the special motion to strike the first, seventh, eighth, and ninth causes of action is reversed. In the interests of justice, each party shall bear their own costs and attorney fees on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.